In The

Supreme Court of the United States

October Term, 1946

No. 80

Jack Parker, et al.,

Petitioners,

—against—

Paul A. Porter, Price Administrator.

PETITIONERS' REPLY BRIEF

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Respondent predicates its argument upon the premise that a tenant is accorded no private right to the possession of housing accommodations either under the Act or the Rent Regulation. Respondent concedes (p. 14, brief) that "if petitioners do have a private right to possession of which they have been deprived by the Administrator, respondent would agree that the phrase 'subject to' in Section 203(a) of the Act should be construed to give petitioners the right to protest and to judicial review in this case."

The issues are thus squarely presented whether a tenant within the meaning of Section 203(a) is "subject to" the respondent's order which necessarily results in his eviction and whether a tenant does have a possessory right which he may protect by the machinery of protest and complaint.

The distinction sought to be drawn between the "public interest" which the respondent is supposed to protect "against action of landlords tending to undermine the rent stabilization program" and private rights of tenants is unrealistic. The Emergency Price Control Act is instinct with the intent to protect tenants from the inequities attendant upon the housing shortage. To distinguish be-

tween the public sought to be protected and the tenants who constitute such public is meaningless.

The guarantee of Section 6 of the Rent Regulation that "no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise" is attacked as being a conditional, but not an absolute restriction against evictions (p. 10, respondent's brief). The fact that a property right is conditional does not derogate from its status as a property right. It is a familiar doctrine in the law of estates that an interest may be vested subject to divestiture, and yet possess the characteristics of a vested interest protected by the law. Here, until certain conditions have been met, the tenant may not be removed from possession. The petitioners maintain that they have been accorded a right --whatever its legal denomination—which entitles them to be heard when events are claimed to occur which would deprive them of this right. Private rights in private dwellings have thus been granted to the tenants during the existence of the national housing crisis.

It does not require a reading of authorities to understand that the issue in housing is houses as well as their price. The inability to construct houses because of the diversion of materials for war purpose has created a crisis of magnitude which faces both the civilians who stayed at home and the veterans who expected at least to find a place to live. Unless occupancy as well as rents is protected the extremely difficult conditions facing the entire nation of lessees would become utterably untenable. The Rent Regulation recognizes this in guaranteeing possession—actual possession—of Defense Area Housing accommodations unless certain unusual events arise. It cannot be argued that possession is alien to the purposes of this Act.

The respondent further seeks to draw a distinction between the issuance of the eviction certificate and the subsequent proceedings to evict. Respondent maintains that

the tenant is not "subject to" the Price Administrator's order because "the issuance of an eviction certificate to a landlord is not an order to the tenant to vacate" (p. 24, respondent's brief). Obtaining an eviction certificate is a necessary prerequisite to a proceeding for eviction at local law and the granting of such certificate inevitably and necessarily results in the actual eviction unless defenses to the proceeding exist at local law. The only purpose in applying for the certificate is to evict the tenant and once a certificate relating to eviction has been granted by the Price Administrator it acts directly upon the tenant and serves to oust him from his housing accommodations. The tenant is the subject of the certificate of eviction and he is most definitely subjected to the Price Administrator's order.

It is contended that the Administrator has interpreted the phrase "subject to" as permitting only landlords, and never tenants to file protests (p. 16 respondent's brief). Section 1300.216 of Revised Procedure Regulation No. 3 is a limitation solely upon the landlord and not upon the tenant. It defines the circumstances in which "a landlord is for the purpose of this Regulation subject to a provision of a maximum rent regulation or of an order * * *" It does not prohibit a protest by the tenant.

The respondent also notes that when the renewal of the Emergency Price Control Act was under consideration in 1944 and 1945, proposals made to broaden the class of persons who might protest were rejected (p. 21). These proposals were made on behalf of trade associations, such as the National Retailers Association, which was seeking the right of protest on behalf of their members. Chester Bowles, then Price Administrator, stated that trade associations had such right under the Act as constituted (pp. 1474-1475, Hearings before Senate Committee on Banking and Currency on S. 1764). The rights of *tenants* to protest their eviction was *not* considered and rejected at these hearings.

Respondent further contends that to allow tenants and consumers the right to protest and judicial review would impose too great a burden of work upon the Administrator so as to weaken his efforts (p. 23). In the first place, we are not here dealing with the right to review a price or rent schedule. The issue here is limited solely to the right to protest where a tenant is evicted under circumstances which should arouse judicial investigation.

The identical argument of increased administrative burdens has been raised frequently to prevent the expansion of the scope of protests. The fears expressed by such enlargement have not been justified. On April 27, 1944, Chester Bowles, then Price Administrator, appeared before the Senate Committee on Banking and Currency and urged that the time to file protests should not be enlarged from the 60 days then permitted under Section 203(a). Mr. Bowles' statement is reminiscent of the present claim made by the respondent. He stated (Hearings before the Senate Committee on Banking and Currency, 78th Cong. 2d Sess. on S. 1764, pages 1474, 1475):

> "There are very substantial reasons for suggesting that protests directed against the authority of a regulation as originally issued should be filed within 60 days of its issuance. It is of great importance from the point of view of industry as well as that of the Office of Price Administration that legal questions with regard to the basic authority of a regulation should be raised and settled as quickly as possible. * * *
>
> The abolition of all time limitations upon the filing of protests would also create *serious administrative difficulties and would greatly handicap the enforcement of price and rent regulations.* If a protest could be filed at any time, irrespective of changed circumstances, the natural tendency of most violators of

> regulations would be to file a protest as soon as enforcement proceedings were brought against them. This step would frequently be taken merely for the purpose of delaying enforcement proceedings even though there were no substantial basis for the protest. The result would be not only that the enforcement would be greatly handicapped but also that the administrator would be confronted with frivolous protests which would absorb time and energies that could ill be spared from the consideration of protests filed in good faith without reference to enforcement proceedings. As indicated more fully below, the inevitable effect would be to delay the disposition of bona fide protests * * *'' (Italics supplied).

Nevertheless, Section 203(a) was amended to permit protests to be filed "at any time." It does not appear that the Price Administrator's burdens were thereby unduly increased.

To hold that the tenants have a right to protest after they have participated in hearings which resulted in an ultimate order against them, would not, as the respondent contends jeopardize the effective administration of the Act nor result in the assumption of a new administrative burden of great magnitude, because by the time the protest was filed by the tenants, the hearings had been held and over 1000 pages of testimony had been taken. What remained when petitioners filed their protest with the respondent was for him to determine the issues raised by the protest *on the merits* and to rule as a matter of substantive right whether the alleged landlords had brought themselves within the terms of the superseded Regulation, and if so, whether they complied with its terms. Instead, the respondent sought refuge in dismissing the tenants' protests as a matter of procedure. This action has effectively blocked any judicial review of his actions by the

tenants as parties aggrieved. Having reversed his subordinates' findings and rendered an opinion, the Price Administrator cannot contend that the effective administration of the Act would be jeopardized if he entertained petitioners' protest, denied it on the merits and allowed them to review his determination in the Emergency Court of Appeals.

The respondent answers petitioners' argument that they became parties to the proceedings before the area rent director with a right to the full hearing of protest and complaint as defined by the Act, by stating that petitioners were acting as witnesses, not as parties (p. 30). Petitioners were, in no sense, witnesses in the hearings. They were requested to participate and to submit briefs, as they did, in support of their contentions that certificates authorizing their evictions should not be issued, and over 1000 pages of testimony were taken, Landlords' witnesses cross-examined by tenants' counsel, briefs submitted in behalf of tenants and the tenants were considered as parties to the proceeding until the Price Administrator reversed the rulings of his three subordinates and for the first time held that the tenants had no standing to protest his reversal.

The *amici curiae* present substantially the same arguments in their brief. They, too, draw a distinction (without a corresponding difference) between the certificate relating to eviction and the actual eviction itself. They also point to Section 1300.215 of Revised Procedural Regulation No. 3, and seek to interpret this regulation as denying the tenants a right to protest. As above shown, this regulation is a limitation upon the landlord, not the tenant. Moreover, the citation from the opinion of the Emergency Court of Appeals in *Thomas Paper Stock Co. v. Bowles*, 148 Fed. (2d) 831, (p. 9), must be viewed in the light of this Court's statement in *Collins* v. *Porter* (14 U. S. Law Week, 4306), that the ruling in *Thomas Paper Stock Co.* v.

Bowles, 148 Fed. (2d) 831, "we have reversed in *Utah Junk Co.* v. *Porter*, decided this day."

The citation from the opinion of the New York Appellate Division in *Werth* v. *Gordon* (p. 10, landlords' brief) is gratuitous and *obiter dictum* on issues that were neither briefed nor considered in the state court and of which the state court had no jurisdiction. The question of the rights of tenants throughout the nation to protest their evictions which are sought by these cooperative schemes is for this Court to determine.

Contrary to the concession made by the respondent, the *amici curiae* maintain that this is not a case for resort to the protection of the Fifth Amendment. As above stated, since the tenants were accorded a right to possession, subject to divestiture under certain given conditions, they do have a property right which should be given the protection of due process when it is sought to deprive the tenants of their right to continued possession. To interpret the Act as denying the tenants the right to administrative and judicial review, is to that extent to interpret the Act unconstitutionally. It is maintained that the procedures of protest and complaint are available under a proper interpretation of the Act, and that the Price Administrator should be directed to extend such machinery to a tenant who is to be deprived of his living quarters.

Respectfully submitted,

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